No. 90-608

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; and GEM BOOKS, INC., doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

vs.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

EARL A. HAGEN
Attorney for Amicus Curiae
Racine News, Superb Video
City News, Sheridan News &
Video and Supreme Video
3166 John Plankinton Building
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 278-8116

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CERTIFICATE OF INTEREST OF AMICUS CURIAE

The undersigned counsel of record for Racine News, Inc., Superb Video, Inc., City News, Inc., Sheridan News & Video, Inc., and Supreme Video, Inc., *amicus,* furnishes the following in compliance with Supreme Court Rule 29.1:

1. Racine News, Inc., Superb Video, Inc., City News, Inc., Sheridan News & Video, Inc., and Supreme Video, Inc., are all corporations existing under and by virtue of the laws of the State of Wisconsin.

2. None of the above-listed corporations has a parent corporation, nor is the stock of any listed corporation publicly held.

3. Only the undersigned attorney is expected to appear on behalf of *amicus,* and only to the extent of filing the attached brief.

Dated at Milwaukee, Wisconsin this 6th day of November, 1990.

Earl A. Hagen
Attorney at Law
3166 John Plankinton Building
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 278-8116

QUESTIONS PRESENTED FOR REVIEW

1. Does the prohibition of Wis. Stat. § 944.21 against the dissemination of obscene magazines and films, while omitting reference to obscene videotapes, deprive the petitioners of equal protection of the law?

2. Was there a compelling state interest or rational legislative basis for excluding obscene videotapes from the prohibitions of Wis. Stat. § 944.21?

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INTEREST OF AMICUS CURIAE

All of the above Wisconsin corporations have retail outlet stores located throughout the State. All are primarily adult-oriented, with business interests identical in nature of those of the petitioners. The investments in said store, together with the revenues generated, are substantial in nature. Any final decision in this case will have the exact same impact on these corporations as on the litigants themselves.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, provides in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Statute, § 944.21 (1987-88) provides in part:

> "944.21(2)(c) - 'Obscene material' means a writing, picture, sound recording or film . . . ."

SUMMARY OF ARGUMENT

Wisconsin's obscenity statute, § 944.21 prohibits the dissemination of obscene magazines and films, but omits any reference whatsoever to obscene videotapes. In view of other existing Wisconsin statutes closely related in subject matter wherein the legislature included specific reference to "videotapes" (as well as proscribing "recordings", "magazines", "films", and "motion pictures") indicates a legislative intent to *exclude* videotapes from

the prohibited materials incorporated in § 944.21.

Since there is no compelling state interest or rational legislative basis for such a classification, § 944.21 violates equal protection of the law.

REASONS FOR GRANTING THE WRIT

I.

THE OMISSION OF VIDEOTAPES FROM WIS. STAT. § 944.21, WHILE INCLUDING "WRITING, PICTURE, SOUND RECORDING OR FILM", DEPRIVES PETITIONERS OF EQUAL PROTECTION OF THE LAWS.

The exclusion, in § 944.21 Wis. Stats., of obscene videotapes from the categories of prohibited material violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that it deprives the petitioners of equal protection of the law. "Obscene material" is confined in said statute to "a writing, picture, sound recording or film."

A videotape is a type of motion picture produced by electronic recording; a film, however, is produced by photography, *i.e.*, "the art or process of producing images on a sensitized surface (as a film) by the action or radiant energy and especially light." (*See Webster's New Collegiate Dictionary* at 864 (1973).)

The Wisconsin legislature's knowledge of these differences between films and videotapes is apparent. When it has intended enactments to refer to videotapes, it has used the terms "videotape" or "tape". *E.g.*, Wis. Stat. §§ 19.35(d), 136.01(9), 967.04(7), and 885.40, *et seq.* When the legislature has intended enactments to apply to both films and videotapes, it has either included both "film" and "videotape", or "film" and "tape",

e.g., Wis. Stat. §§ 19.32(2), 44.015(3), 51.61(1)(o), 77.54(23m), 968.13(2), or a broader descriptive term such as "audio-visual materials in any format," *e.g.*, Wis. Stat. § 943.61(1)(c).

The United States Congress and numerous state legislatures similarly have recognized that the term "film" does not include "videotapes." Typical enactments contain references to both terms. *See, e.g.*, 26 U.S.C. § 263A(b); 26 U.S.C. §§ 465(c)(1)(A), 465(c)(2)(A)(i), and 465(c)(7)(E)(ii)(II); 38 U.S.C. § 1796(b); 42 U.S.C. § 2000aa-7(a); Cal. Rev. & Tax Code § 6006(g)(1); Ill. Rev. Stat. ch. 38, § 11-20.1; Minn. Stat. § 617.246; Mo. Rev. Stat. § 573.010; and, N.M. Stat. Ann. § 30-6A-2.

In fact, obscenity laws in other jurisdications have specifically distinguished videotapes from other formats. *E.g.*, S.C. Code Ann. § 6-15-375(2).

Most importantly, the Wisconsin legislature reserved the terms "film" and "videotape" for separate and distinct references in the context of sexually explicit materials. In Wis. Stat. § 940.203, the legislature proscribed the recording or photographing of a child engaged in sexually explicit conduct. In each of the statute's subsections, the legislature separately described "film" recordings and "videotape" recordings. Subsection (1): ". . . filming, videotaping . . ."; (2): ". . . film, videotape . . ."; (3): ". . . filmed, . . . videotaped . . .".

Furthermore, an examination of Chapter 948, Wis. Stats. 1987-88, entitled "Crimes Against Children", discloses numerous inclusions of some form of the term "videotape", and in each instance it is juxtaposed with either the term "film", "motion picture", or "recording". The inclusion or various references to "videotapes" in that was not mere surplusage. The legislature intended those references to be given individual and specific effect.

In its decision, the Circuit Court of Appeals stated:

> ". . . a videotape is a form of recording and also a form of film (loosely understood), so there is no semantic barrier to fitting videotapes under the statute . . .".

Applying that rationale to the child pornography laws, results in negating any necessity for the legislature to have included the term "videotape" therein, thereby rendering its inclusion mere surplusage.

> ". . . statutes should be construed in a manner which will avoid a construction that makes a word or phrase superfluous." *Green Bay Broadcasting Company v. The Redevelopment Authority,* 116 Wis. 2d 1, 19, 343 N.W. 2d 27 (Wis. 1983).

> "A statute should be construed so that no word or clause shall be rendered surplusage and every word, if possible, should be given effect." *Donaldson v. State,* 93 Wis. 2d 306, 315, 286 N.W. 2d 817 (Wis. 1980).

> "Effect should be given to each word, clause and sentence in a statute." *State v. Smith,* 103 Wis. 2d 361, 365, 309 N.W. 2d 7 (Wis. 1981).

When the legislature enacted and subsequently revised § 940.203, now § 948.05 Wis. Stats., "Sexual Exploitation of a Child", and § 948.12 Wis. Stats., "Possession of Child Pornography", it clearly was *not* satisfied that the terms "film", "motion picture", "recording", and "photography" were broad enough or inclusive enough to incorporate within their separate and/or collective definitions the specific electronic process known as "videotaping".

For that reason, both the original § 90.203 Wis. Stats., and the 1987 revision thereof (§ 948.05 Wis. Stats.), included and subsequently retained the terms "videotape", "videotaping" and "videotapes".

Additionally, the legislative commentary relative to the *1987 - Act 332,* (§ 948.12 Wis. Stats.) states:

> "Creates a new criminal statute prohibiting possession of a film, photograph, *videotape* or other pictorial reproductions of a child engaged in sexually explicit conduct." (Emphasis supplied.)

The revision of § 948.05 and the enactment of § 948.12 all took place in the 1987-88 legislative biennium, *the very same biennium in which the challenged obscenity statute was promulgated.*

However, when delineating the material intended to be covered by Wis. Stat. § 944.21, the obscenity statute, the legislature specifically referred only to "a writing, picture, sound recording or film". No mention whatsoever was made with reference to the term "videotape".

The obscenity statute and the statutes relating to child pornography are closely related in subject matter. It defies logic to conclude that the legislature found it so compelling to include the terms "videotape" and "videotaping" on numerous occasions within the chapter dealing with "Crimes Against Children", and then inadvertently omitted all references thereto when enacting the obscenity statute, Wis. Stat. § 944.21.

The exclusion of any reference to "videotapes" in the obscenity statute was clearly by legislative design.

> "The only mode in which the will of the legislature is spoken is in the statute itself. Hence, in the construction of statutes, it is the legislative intent manifested in the statute that is of importance, and such intent must be determined primarily from the language of the statute. No intent may be imputed to the legislature in the enactment of a law other than such is supported by the face of the law itself. The courts may not speculate as to the probable intent of the legislature *apart from the words.* A statute is to be taken, construed, and applied in the form enacted. As a reason for these rules, it has been declared that *the legislature must be presumed to know the meaning of words, and to have used the words of a statute advisedly.*" *See* 73 Am. Jur. 2d, *Statutes,* § 196 at page 393. (Emphasis supplied.)

> "The starting point for interpreting a statute is the language of the statute itself; absent a clearly expressed legislative intention to the contrary, that *language must ordinarily be regarded as conclusive.*" (Emphasis supplied.) *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980).

Fundamental due process requires that every penal statute provide adequate and sufficient notice to those who would seek to avoid the consequences of the legislation. They are entitled to know precisely that conduct which will invoke its sanctions.

As written, the statute appears to exclude the sale and/or distribution of "videotapes". The failure of the statute to include any reference whatsoever to "videotapes", when other statutes related in subject matter make numerous references to that term,

appears to give notice that the omission was intended to exempt videotapes from its operation.

> "[I]t is assumed that whenever the legislature enacts a provision, *it had in mind previous statutes relating to the same subject matter,* wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and 'they should all be construed together.' " (Emphasis supplied.) *In the Interest of I. L. v. Milwaukee County,* 151 Wis. 2d 725, 731-32, 445 N.W. 2d 729 (Wis. 1989).

Nevertheless, both the trial and appellate courts concluded that the obscenity statute being challenged (Wis. Stat. § 944.21) *impliedly* forbids obscene videotapes.

No person may be subjected to the provisions of a criminal statute by implication. *The statutory offense must come within the actual words of the statute* and a court should not expand its scope in an attempt to save the statute by judicial interpretation.

> "It is a fundamental rule of criminal law that no case is to be brought within a statute charging an offense unless completely within its words; and no person is to be made subject to the provisions of a criminal statute by implication. *Bishop on Statutory Crimes,* §§ 194 and 220. This author says, § 194: 'Such statutes are to reach no further in meaning than their words; *no person is to be made subject to them by implication,* and all doubts concerning their interpretation are to preponderate in favor of the accused. Only those transactions covered by them which are within both

> the spirit and their letter'. A statutory offense, therefore, has precisely the proportions which the statute gives to it, and can have no other or greater." (Emphasis supplied.) *Laun v. Pacific Mutual Life Insurance Co.*, 131 Wis. 555, 572; 111 N.W. 660 (Wis. 1907).
>
> * * *
>
> "The legislature has expressed its intent, and, under elementary rules of law, *it is not the province of the court to extend the scope of a criminal statute.*" *Shinners v. State ex rel. Laacke,* 219 Wis. 23, 28, 261 N.W. 2d 880, 882 (Wis. 1935). *See also, State v. Schaller,* 70 Wis. 2d 107, 233 N.W. 2d 416, 419 (Wis. 1975).

The refusal of courts to expand the scope of criminal statutes to include offenses which are not completely within its words was recently demonstrated in *State of Iowa v. Applause Video, Inc.*, 434 N.W. 2d 864 (Iowa 1989).

Iowa's obscenity statute prohibits the "selling or offering for sale" of certain hard core pornography. The defendant was charged with violating that statute by "renting" the prohibited material to its patrons. The State proceeded on the theory that although the statute made no specific reference to "renting", nevertheless, the clear intent of the legislature was to also prohibit this type of activity and that to conclude otherwise would only lead to an absurd result.

The court rejected the State's contention:

> "The State argues strenuously that the legislature intended to proscribe rental of the

materials. It points out that it is incongruous, even absurd, to suppose the legislature would undertake to prohibit the sale of obscene materials but at the same time allow persons to profit from their rental. The argument has decided appeal. One is hard pressed to understand how the legislature would wish to draw a line between two equally repugnant commercial transactions, *but it did just that.*" (Emphasis supplied.)

"According to the rubric we must search out the legislature's intent as shown by how it worded the statute, not by how it should or might have. Citizens, even those bent on conduct most would consider unacceptable, have a clear right to base a controversial course of conduct on a clear understanding of what the law actually prohibits. Hence, a criminal statute must give fair warning of the conduct which makes it a crime." (*Citing Bouie v. Columbia,* 378 U.S. 347, 350-351, 84 S. Ct. 1697, 1701, 12 L. Ed. 894, 898 (1964).

* * *

"It is the legislature, not the court, which is to define crime and ordain its punishment . . ." (*Applause Video* at page 865.)

See also, State ex rel. Husting v. State Board of Canvassers, 159 Wis. 216, 150 N.W. 542, 547 (Wis. 1915), wherein the Wisconsin Supreme Court quoted with approval the following language of Lord Campbell in *Coe v. Lawrence,* 1 El. & B. 516:

"I really cannot doubt what the legislature intended to do; but they have not carried it into

> effect . . . It is better that we should adhere to the words they have used, than that we should strive to amend it."

As indicated above, the Seventh Circuit Court of Appeals took the position that there is no semantic barrier for including videotapes within the purview of the statute since, "a videotape is a form of recording and also a form of film (loosely understood)".

The issue, however, is not whether a *loose understanding* of the words "recording" and or "film" could conceivably include the term videotape within their ambit, but rather does the statute in its present form provide fair and adequate *due process notice* that its prohibition extends to "videotapes", even though that term is neither mentioned nor referred to anywhere within said statute.

> "Due process requires that a criminal statute be sufficiently definite to give a person of ordinary intelligence, who seeks to avoid the penalties, fair notice of what conduct is required or prohibited and to allow law officers, judges and juries to objectively apply the law to a defendant's conduct without creating or applying their own individual standards to determine guilt." *State v. Bartlett,* 149 Wis. 2d 557, 439 N.W. 2d 595, 598 (Wis. C.A. 1989).

The principle of statutory construction requiring courts to give a criminal statute a narrow, strict and limited construction precludes *any* consideration for applying a "loose understanding" to any of its words or phrases.

> "Before a man can be punished, his case must

be plainly and unmistakably within the statute." *United States v. Brewer,* 139 U.S. 278, 288 (1891).

II.

THE OMISSION OF VIDEOTAPES FROM WIS. STAT. § 944.21 CANNOT BE SUPPORTED BY EITHER A COMPELLING STATE INTEREST OR A RATIONAL LEGISLATIVE BASIS.

Videotape materials by and large are the predominant medium for the dissemination of sexually explicit depictions in today's "adult" market. That being the case, there simply could not be rational, much less compelling state interest for a classification in an obscenity statute which deliberately omitted the major mechanism for disseminating sexually explicit depictions.

An analogous classification was declared unconstitutional under a Fourteenth Amendment equal protection analysis in *Wheeler v. State,* 281 Md. 593, 380 A.2d 1052 (Md. 1977), *cert. denied,* 435 U.S. 997 (Md. 1978).

There the court reviewed the Maryland obscenity law which imposed less rigorous controls on obscene films than it did on obscene magazines, photographs and other printed materials. The court determined that there could not be a rational basis for such a classification, necessarily implying that there could not have been a compelling state interest for such a classification.

> "[A] classification based upon control of obscene films and pictures more lenient than those imposed on other obscene matter certainly could not serve as a rational basis for that classification in light of the governmental objective." (380 A.2d at 1060).

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have relevance to the purpose for which the classification is made." *Baxstrom v. Herold,* 383 U.S. 107, 111 (1966). The standard contained in the rational basis test is not "toothless". *Mathews v. Lucas,* 427 U.S. 495, 510 (1976); *Sklar v. Byrne,* 727 F.2d 633, 640 (7th Cir. 1984).

In some instances courts have found justifications for omissions or exemptions in criminal statutes. For example, it is rational for a legislature to omit or exempt certain activities even though they may be similar in nature to the prohibited acts, where the exempt activities pose a less serious societal danger. *See, e.g., Doe v. Edgar,* 721 F.2d 619, 622-23 (7th Cir. 1983). Likewise an omission or exemption has been upheld where the court has discovered evidence of a legislative intent eventually to expand the prohibitions of the statute to the omitted class of activities. *See, e.g., Peterson v. Lindner,* 765 F.2d 698, 707 (7th Cir. 1985).

Reasons, such as these, that have justified omissions or exemptions in other cases do not arise under § 944.21. There is no evidence that magazines, films and other materials, as opposed to videotapes, pose a greater societal danger.

In fact, if distribution of obscene materials to adults does present a societal danger, it would hardly seem rational to exclude obscene videotapes from the operation of § 944.21, given the evidence that videotapes now are the pervasive medium for viewing sexually explicit conduct. For example, the Meese Report concluded that the VCR has become ". . . the dominant mode or presentation of non-still (pornographic) material . . . ." United States Department of Justice, Final Report: "Attorney General's Commission on Pornography" (Washington: U.S. Government Printing Office, 1986).

Moreover, there is no evidence to support an argument that the present legislation is part of an overall plan to expand or create more comprehensive prohibitions that will eventually encompass videotapes.

In *Salem Inn, Inc. v. Frank,* 522 F.2d 1045 (2d Cir. 1975), the court reviewed a topless dancing ordinance that applied to ". . . cabarets, bars, lounges, dance halls, discotheques, restaurants and coffee shops . . .", but did not apply to opera houses, theaters, playhouses, ballets or movies. Noting that the ordinance would permit a burlesque theater to operate legally, while a cabaret could not stage a production of "Hair", the court applied the rational basis test, and then concluded:

> "[T]he Town has failed to show any legitimate underlying municipal interest to which its discrimination among various commercial establishments can be rationally related." (*Id.* at 1409).

In the same vein, there cannot arguably be a legitimate state interest in promulgating an obscenity statute such as § 944.21 with an intent to discriminate among various commercial media offering allegedly obscene material.

CONCLUSION

For these various reasons, the exclusion of persons who deal in allegedly obscene videotapes and the inclusion of persons who deal in allegedly obscene film and printed matter, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

EARL A. HAGEN
Attorney for Amicus Curiae Racine News, Superb Video, City News, Sheridan News & Video and Supreme Video
3166 John Plankinton Avenue
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 278-8116